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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G051524
v.	(Super. Ct. No. 11WF1672)
LAP PHUONG NGUYEN,	O P I N I O N
Defendant and Appellant.	

Appeal from a postjudgment order of the Superior Court of Orange County, Thomas A. Glazier, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Lap Phuong Nguyen sought redesignation of his felony convictions for violating Penal Code section 484e, subdivision (d), as misdemeanors. (All further statutory references are to the Penal Code.) The trial court denied defendant's request, and defendant appeals.

We affirm. Section 484e is not listed as one of the felony convictions for which redesignation and resentencing may be sought. Further, the language of section 484e does not permit an interpretation that would allow a violation of that section to be redesignated as a misdemeanor. Finally, because the burden is on the defendant to prove his or her entitlement to redesignation, and because defendant here admits there is no proof that the value of the access card account information he obtained was less than $950, his request would fail.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant was convicted of one count of receiving stolen property (§ 496, subd. (a)), three counts of unlawful acquisition of access card account information (§ 484e, subd. (d)), and one count of second degree burglary of a vehicle (§§ 459, 460, subd. (b)). The specific facts underlying defendant's convictions are included in our earlier unpublished opinion, *People v. Nguyen* (June 14, 2013, G046381).

On December 17, 2014, defendant filed a petition to recall his felony convictions and to redesignate all of them as misdemeanors. Following a hearing, the trial court denied defendant's petition.

DISCUSSION

On appeal, defendant's argument is limited to the three felony convictions for violating section 484e, subdivision (d), by unlawfully acquiring access card account information.

In 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18), which makes certain drug- and theft-related offenses misdemeanors, unless those offenses were committed by certain ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089, 1091.) Those offenses previously had been designated as felonies or as crimes that can be punished as either felonies or misdemeanors. (*Id.* at p. 1091.)

Section 490.2, subdivision (a), which was added by Proposition 47, provides: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor."

Defendant was convicted under section 484e, subdivision (d), which is one of the statutes defining "theft" in the context of access card offenses. (See §§ 484d-484j.) Section 484e, subdivision (d) provides: "Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft." Defendant claims that because it is possible that the value of the access card account information he possessed was less than $950, his crimes should be reclassified as misdemeanors based upon section 490.2, subdivision (a), or, at a minimum, that the trial court should not have summarily denied his petition for redesignation. The Attorney General responds that section 484e, subdivision (d) was not affected by section 490.2, subdivision (a) because Proposition 47 was not intended to

apply to the identity theft crime covered in section 484e, subdivision (d). We agree with the Attorney General.

First, section 484e is not included in the list of statutes defining felony offenses that qualify for redesignation as misdemeanors. When interpreting a statute, "'we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls.'" (*People v. Leiva* (2013) 56 Cal.4th 498, 506.)

Second, it is not reasonable to interpret section 484e in such a way that it could be within section 490.2, subdivision (a). In distinguishing between grand theft and petty theft, section 490.2 focuses on the monetary value of the property taken. Section 490.2, subdivision (a) expressly references section 487, which states that grand theft is committed "[w]hen the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950)." (§ 487, subd. (a).)

Although section 490.2, subdivision (a) purports to apply to all provisions defining grand theft, it mentions only section 487. Sections 490.2, subdivision (a) and 487, subdivision (a) are similar in that they refer specifically to the value of the "money, labor, or real or personal property" obtained by the theft. In other words, both statutes presume a loss to the victim that can be quantified to assess whether the value of the money, labor, or property taken exceeds the $950 threshold. Section 484e, subdivision (d), however, does not contemplate such a loss.

The elements of a section 484e, subdivision (d) offense are (1) the acquisition or retention of the account information of an access card issued to someone else, (2) without the consent of the cardholder or issuer of the card, and (3) with the intent to fraudulently use that information. (*People v. Molina* (2004) 120 Cal.App.4th 507, 517.) It is not necessary that anyone actually be defrauded or suffer a loss due to the defendant's acts. (*Id.* at p. 516.)

This distinction is underscored by section 484g, which makes it a separate crime for the defendant to actually use the access card or account information to "obtain[] money, goods, services, or anything else of value." (§ 484g.) Under this statute, if the value of the money, goods, services, or anything else of value obtained by use of the access card or account information exceeds $950 in any consecutive six-month period, the defendant is guilty of grand theft. (*Ibid.*) Thus, a defendant who uses access card account information to obtain goods may be charged with grand theft under section 484e, subdivision (d) and either grand theft or petty theft under section 484g, depending on the value of the goods taken. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1471.)

Finally, defendant argues that the trial court should not have summarily denied his petition under section 1170.18 because nothing in the record established "as a matter of law" (capitalization & boldface omitted) that the relief requested was unavailable because there was no evidence that the losses due to his crimes were in excess of $950, that defendant was within the criminal history exclusion in the statute, or that defendant would pose an unreasonable risk of danger to the community. However, defendant bore the burden of establishing his eligibility for relief under section 1170.18. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880.) Therefore, any failure to prove defendant came within the statute precludes him from obtaining relief.

The issue whether felony violations of section 484e should be subject to redesignation and resentencing is currently pending before the California Supreme Court. (See *People v. Romanowski* (2015) 242 Cal.App.4th 151, review granted Jan. 20, 2016, S231405.) Our decision here is without prejudice to defendant refiling a petition under section 1170.18, should the decision of the Supreme Court be contrary to our decision here.

DISPOSITION

The postjudgment order is affirmed.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.